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NO. 85-968

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BILL ARMONTROUT,
WARDEN, MISSOURI STATE PENITENTIARY,
Petitioner,

vs.

BRIAN KEITH MOORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(d) requires a federal court to presume that the Missouri appellate court correctly interpreted the fourteenth amendment's due process clause when it retroactively applied to respondent an expanded and unforeseeable interpretation of Missouri's felony-murder statute?

2. Whether a federal court must defer to the Missouri appellate court's interpretation of the federal constitution which permitted a retroactive application of an expanded and unforeseeable interpretation of Missouri's felony-murder statute?

3. Whether the Court of Appeals for the Eighth Circuit correctly interpreted Bouie v. City of Columbia, 378 U.S. 347 (1964) when it held that the Missouri Supreme Court retroactively applied an expanded and unforeseeable interpretation of Missouri's felony-murder statute to affirm respondent's conviction and thereby denied respondent due process of law as required by the fourteenth amendment?

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Respondent, Brian Keith Moore, respectfully requests this Court to deny the petition for certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner failed to include the provisions of 28 U.S.C. § 2254(d) which respondent has included in Appendix A to this brief.

STATEMENT OF THE CASE

I. Factual Background

Petitioner and respondent have never disputed the relevant facts during the litigation of respondent's habeas petition. The disagreement between the parties rests solely on legal grounds: the proper interpretation and application of the fourteenth amendment's due process clause to the facts of this case.

On June 28, 1975, respondent, Brian Keith Moore, and two accomplices attempted to rob the Emergency Room Lounge in the City of St. Louis. During the course of the attempted robbery, Albert "Rip" Williams, a patron of the Lounge, exchanged gunshots with Moore and his accomplices. In the exchange of gunfire, Rip Williams shot and killed Lawrence Meadows, another patron of the Lounge. Petitioner has never disputed at trial or during any appeal that Williams, a non-participant in the robbery, fired the shots which killed Meadows.

The State of Missouri charged Moore with murder in the first degree and attempted robbery in the first degree. Moore's first trial on these charges resulted in a hung jury. On November 15, 1976, a second jury convicted Moore of both the murder and attempted robbery charges.

II. Procedural History

Moore appealed his convictions to the Missouri Court of Appeals for the Eastern District. He contended that the State

improperly convicted him of felony-murder, under Mo. Rev. Stat. § 559.010 (1969) (repealed Sept. 28, 1975), because neither he nor one of his accomplices fired the bullet that killed Meadows.

The Missouri Court of Appeals agreed with Moore. That court found that the Missouri Supreme Court, in State v. Majors, 237 S.W. 486 (Mo. 1922), had interpreted Missouri's felony-murder statute in a case involving facts that were "remarkably similar" to the case at bar. In Majors, the Missouri Supreme Court held that Missouri's felony-murder statute only applied where a homicide was committed by the defendant or his accomplice. State v. Moore, No. 38,783, slip op. at 7 (Mo. Ct. App. June 27, 1978) (Respondent's Appendix at A-10) (hereinafter referred to as "Moore I").[1] Moore I held that "[u]nder the holding of Majors and under the facts of this case, defendant could not be found guilty of the felony murder of the victim as he was not acting in concert with 'Rip' Williams, who actually fired the fatal shot." Id. at 7-8. (Respondent's Appendix at A-11)

The Missouri Court of Appeals transferred the case to the Missouri Supreme Court pursuant to Article V, § 10 of the Missouri Constitution which permits transfer to the Missouri Supreme Court "for the purpose of re-examining the existing law." (emphasis added); see also Mo. S. Ct. R. 30.27 and 83.02. The court opined:

> There has been no further pronouncement by the supreme court on the precise issue before us since the 1922 Majors case, and we believe its holding should be re-examined . . . .
>
> While we would be obliged to reverse defendant's conviction for first degree murder by reason of State v. Majors, supra, we certify this case to the Supreme Court for reconsideration of the

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[1]Respondent has reproduced the Missouri Court of Appeals' Moore I opinion in Appendix B to this brief. This Court should not confuse respondent's identification of "Moore I" with the Eighth Circuit's different identification of "Moore I" with the Missouri Supreme Court's opinion concerning Moore's appeal.

> felony-murder doctrine as it would apply to a person who perpetrates a felony where another is killed by someone resisting a felony.

Moore I at 8-9. (Respondent's Appendix at A-11 and A-13)

The Missouri Supreme Court reexamined its former interpretation of Missouri's felony-murder statute. The court decided to adopt a new "proximate cause" theory of the felony-murder doctrine.[2] The court overruled Majors and State v. Glenn, 429 S.W.2d 225 (Mo. 1968), both of which promulgated the "agency" theory of felony-murder, and stated that those cases "must no longer be followed." State v. Moore, 580 S.W.2d 747, 753 (Mo. 1979) (en banc) (hereinafter referred to as "Moore II"). Despite Moore II's adoption of an expanded application of Missouri's felony-murder statute, the Missouri Supreme Court failed to address the issue of whether the fourteenth amendment's due process clause precluded it from retroactively applying its new holding to Moore.

Moore attacked the constitutionality of his felony-murder conviction in a motion for post-conviction relief in the Missouri courts. In Moore v. State, 651 S.W.2d 578 (Mo. Ct. App. 1983) (hereinafter referred to as "Moore III"), a second panel of the Missouri Court of Appeals addressed his due process argument. Unlike the Moore I panel, the Moore III panel did not think that Majors' agency theory of felony-murder required the court of appeals to vacate Moore's felony-murder conviction. The court based its decision solely on its interpretation of the fourteenth amendment's due process clause and this Court's decision in Bouie v. The City of Columbia, 378 U.S. 347 (1964). Moore III at 581. Thus, the court of appeals held:

> In light of the test which the Missouri Supreme Court adopted in Glover in 1932 [State v. Glover,

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[2]The Eighth Circuit described the important differences between the "agency" and "proximate cause" theories of felony-murder. Petitioner's Appendix at A-4 to A-5.

> 50 S.W.2d 1049 (Mo. 1932) (defendant, who committed an arson-homicide, held liable for felony-murder)], we think that since the victim's death was the natural and proximate result of defendant's actions, movant was put on notice that his conduct would be considered first degree murder. Consequently, the construction put on § 559.010 by the Missouri Supreme Court could not be considered to be either 'unexpected' or 'indefensible' and can be given retroactive application to defendant without violating the due process clause of the United States Constitution. Id.

The Eighth Circuit determined that the Moore III court misinterpreted and misapplied Bouie. Moore v. Wyrick, 766 F 2d 1253 (8th Cir. 1985) (hereinafter referred to as "Moore IV"); Petitioner's Appendix A (hereinafter referred to as "P.A.") at A-1. The Eighth Circuit therefore vacated Moore's felony-murder conviction, and held that Moore did not have fair warning of the Missouri Supreme Court's unforeseeable interpretation of Missouri's felony-murder statute. Id.[1]

SUMMARY OF THE ARGUMENT

Bouie v. City of Columbia held that a state may not retroactively apply an unforeseeable interpretation of a state's criminal statute. The Eighth Circuit applied the Bouie due process test to vacate respondent's conviction. The court held that the Missouri Supreme Court's decision to apply retroactively a new and unforeseeable "proximate cause" theory of

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[1]The Eighth Circuit ordered Moore's release dependent upon the completion of his attempted robbery conviction. Moore IV, P.A. at A-11. The court presumably desired to give the State of Missouri an opportunity to request a state court to reinstate Moore's attempted robbery conviction which had previously been vacated on double jeopardy grounds in light of Moore's felony-murder conviction. The issue is moot, however, because Moore has already completed serving his sentence for attempted robbery.

Moore was incarcerated for more than ten years before he was released in accordance with the Eighth Circuit's order. Petitioner did not make any effort to obtain a stay of the Eighth Circuit's order.

Missouri's felony-murder statute deprived respondent of due process of law.

The federal habeas statute, 28 U.S.C. § 2254(d), requires a federal court to presume that a state court correctly decided factual issues which were determined at an evidentiary hearing. An evidentiary hearing never occurred at the state or federal level as the facts have not been in dispute. The parties have only disputed purely legal questions concerning the interpretation and application of Bouie's due process standard. Therefore, the Eighth Circuit need not defer to the legal conclusions of the Missouri Court of Appeals in Moore III.

A federal court should also not defer to the Missouri appellate court's interpretation of the federal constitution which permitted a retroactive application of an expanded and unforeseeable interpretation of Missouri's felony-murder statute. The Eighth Circuit never decided a single question of Missouri law. It merely applied Bouie's due process test to an existing body of Missouri common-law. If the Eighth Circuit had deferred to the Missouri appellate court on the retroactivity issue, it would have abdicated its constitutional duty to interpret and apply federal constitutional law.

The Moore IV court correctly characterized Bouie's due process constitutional test in terms of "fair warning," "fair notice," and "unforeseeability." It properly found that Moore did not have fair warning of the Missouri Supreme Court's decision to overrule its long-standing precedent of State v. Majors which had adopted a narrow "agency" theory of Missouri's felony-murder statute.

The Eighth Circuit's opinion does not conflict with any opinion of this Court or any other federal or state court. The opinion has little precedential value as it merely represents one of many federal and state cases which has applied Bouie

and its progeny. Accordingly, this Court should deny the petition for writ of certiorari to the Court of Appeals for the Eighth Circuit.

ARGUMENT

I. THE FEDERAL HABEAS STATUTE, 28 U.S.C. § 2254(d), DOES NOT REQUIRE A FEDERAL COURT TO PRESUME THAT THE MISSOURI APPELLATE COURT CORRECTLY INTERPRETED THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHEN IT RETROACTIVELY APPLIED TO RESPONDENT AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY-MURDER STATUTE.

A. The Missouri Court Of Appeals' Interpretation Of Bouie v. City of Columbia And The Fourteenth Amendment's Due Process Clause Cannot Be Construed As A "Factual" Issue.

The Missouri Supreme Court never addressed the issue of whether it could retroactively apply to Moore its new interpretation of Missouri's felony-murder statute in Moore I. The Missouri Court of Appeals held, however, that the Missouri Supreme Court's affirmance of Moore's felony-murder conviction did not violate Moore's due process rights. Moore III, 651 S.W.2d at 578. The court based its holding solely on its interpretation of Bouie. Id. The constitutional issue under Bouie was purely a legal question which did not include any factual determinations. The resolution of this issue required the Missouri Court of Appeals to apply the Bouie due process standard to various Missouri Supreme Court opinions which had previously interpreted Missouri's felony-murder statute.

Factual assertions generally involve "inquiries about who, when, what, and where." Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229, 235 (1985). These issues were resolved at Moore's trial and have never been disputed throughout the course of Moore's habeas litigation.

The federal habeas statute, 28 U.S.C. § 2254(d), only requires a federal court to presume that a state court correctly decided factual issues. Thus, the habeas statute presumes

that the state court's findings are correct only if they are based on "a determination after a hearing on the merits of the factual issue." Id. The Missouri courts did not hold and could not have held an evidentiary hearing to resolve Moore's constitutional claims which required a determination of purely legal issues.

B. Even If The Retroactivity Issue Were Characterized As A Mixed Question Of Law And Fact, The Statutory Presumption Under 28 U.S.C. § 2254(d) Does Not Apply.

Even if one characterized the constitutional retroactivity issue as a "mixed question of law and fact" or a resolution of an "ultimate constitutional question," the statutory presumption under 28 U.S.C § 2254(d) does not apply. Sumner v. Mata, 455 U.S. 591, 597 and n. 10 (1982) (per curiam). Thus, the Eighth Circuit had not only the right but also the duty to review independently the Missouri Supreme Court's and the Missouri Court of Appeals' decisions in Moore II and III.

This Court's recent decision in Miller v. Fenton, No. 84-5786, slip op. (U.S. Dec. 3, 1985) offers additional justification for the Eighth Circuit's independent constitutional review in Moore IV. The Miller Court acknowledged that "the decision to label an issue a 'question of law,' 'a question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." Miller, slip op. at 9. Thus, this Court has deferred to a state judge's factual determination when the issue involves an "inquiry into state of mind." Id. at 9 (citing Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam) (determination of defendant's competency to stand trial)). Similarly, this Court has deferred to a state trial judge's determination of the credibility of witnesses which involves the subjective evaluation of an individual's demeanor. Miller, slip op. at 10 (citing Patton v. Yount, 467

U.S. ____, 81 L. Ed. 2d 847 (1984) ,determination of a juror's impartiality); Wainwright v. Witt, 469 U.S. ____, 83 L. Ed. 2d 841 (1985) (determination that a juror in a capital murder case was biased and, therefore, properly excluded for cause); see also Rushen v. Spain, 464 U.S. 114 (1983) (per curiam) (evaluation of juror's misconduct); Marshall v. Lonberger, 459 U.S. 422 (1983) (voluntariness of guilty plea).

None of the issues in the case at bar depend on a trial judge's subjective evaluation of an individual's state of mind or demeanor. No special justification exists, therefore, for a federal court to presume that the Missouri Court of Appeals correctly adjudicated Moore's constitutional claim in Moore III.

Miller also recognized that when the "state-court judge is not in an appreciably better position than the federal court," the federal court should independently apply the constitutional standard to the facts. Miller, slip op. at 13. This Court expressed special concern about "strip[ping] a federal court of its primary function as expositor of law." Id. at 10. In contrast to the views expressed in Miller, petitioner suggests that the federal courts should abdicate their responsibility to interpret the Constitution to the state courts. Miller has soundly rejected petitioner's theory.

Even if one could somehow characterize the constitutional due process retroactivity issue as a factual issue, the habeas statute would still not allow a federal court to presume that a state court correctly decided the issue. 28 U.S.C. § 2254(d)(7) directs the federal habeas court not to presume that a state court's factual finding is correct when the "applicant was otherwise denied due process of law in the State court proceeding." Moore's due process claim triggers this statutory exception to the presumption rule and authorizes independent federal review of the Missouri courts' findings.

II. A FEDERAL COURT SHOULD NOT DEFER TO THE MISSOURI APPELLATE COURT'S INTERPRETATION OF THE FEDERAL CONSTITUTION WHICH PERMITTED A RETROACTIVE APPLICATION OF AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY-MURDER STATUTE.

A. Bouie v. City of Columbia and Weaver v. Graham Support the Eighth Circuit's Independent Review of the Missouri Appellate Court's Constitutional Application of the Fourteenth Amendment's Due Process Clause.

The Missouri Supreme Court did not address Moore's fourteenth amendment argument in Moore I. The Missouri Court of Appeals, however, denied Moore's constitutional claim based on its analysis of the due process clause and its understanding of Bouie. Moore III at 581. That court held that the Missouri Supreme Court's application to respondent of the proximate cause theory of Missouri's felony-murder statute "could not be considered to be either 'unexpected' or 'indefensible' and can be given retroactive application to defendant without violating the due process clause of the United States Constitution." Id.[4]

The Eighth Circuit independently applied Bouie's due process test to vacate the Missouri Supreme Court's affirmance of Moore's felony-murder conviction. Moore IV, P.A. at A-10. The Eighth Circuit vacated Moore's conviction because it held that he did not have fair warning or notice of the Missouri Supreme Court's unforeseeable expansion of Missouri's felony-murder statute. Id. at A-3, A-10.

The due process test established in Bouie requires a federal court to decide whether a state court has retroactively applied a new or expanded interpretation of a state criminal statute.

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[4]The use of the term "unexpected" and indefensible" suggests that the Missouri Court of Appeals, the Eighth Circuit dissenting judge, and petitioner have misunderstood Bouie's due process test. The Eighth Circuit majority correctly described the test in terms of "unforseeability," "fair notice" and "fair warning." Moore IV, P.A. at A-3; see also § III infra.

In Bouie, the Court analyzed the South Carolina Supreme Court's interpretations of South Carolina's trespass statutes. 378 U.S. at 356-60. Similarly, before the Eighth Circuit found a constitutional violation, it examined the Missouri Supreme Court's pre-Moore II interpretations of Missouri's felony-murder statute.

Bouie based its due process holding on the proposition that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids." 378 U.S. at 353; see also id. at 362. This Court has repeatedly held that "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Weaver v. Graham, 450 U.S. 24, 33 (1981). The holding in Weaver should also apply to a federal court's due process analysis of whether a state court has retroactively applied a new interpretation of the state's criminal law. Accordingly, the Eighth Circuit had a duty to independently apply the Bouie due process standard without deferring to the Missouri Court of Appeals' constitutional analysis.

B. The Eighth Circuit's Ruling Does Not Conflict With Wainwright v. Goode.

Wainwright v. Goode, 464 U.S. 78, 84 (1983) held that a federal court should generally defer to a state court's interpretation of a question of state law. The Court found that a federal habeas court should have accepted the Florida Supreme Court's holding that a state trial judge did not rely on an improper factor in imposing the death penalty under Florida law. Id. This Court, therefore, reversed the Eleventh Circuit's finding of an eighth amendment violation which depended upon the resolution of an independent and distinct question of Florida law.

In contrast to the issue presented in Goode, the Bouie due process test requires a federal court to apply a constitutional standard which is inextricably connected with an examination of state law.[5] In applying the Bouie test, the federal court does not decide any questions of state law. It merely applies a federal constitutional standard to an existing body of state law.[6]

The Eighth Circuit applied Bouie's constitutional standard when it held that the Missouri Supreme Court retroactively applied to Moore an expanded version of Missouri felony-murder statute. If the court had deferred to the Missouri Court of Appeals on this issue, it would have abdicated its constitutional duty to interpret and apply federal constitutional law.[7]

Even if one assumes that the Eighth Circuit should have given some deference to the Missouri appellate courts, one wonders whether the federal court should have given greater deference to the Moore I or Moore III panel. The Moore I panel found that the pre-Moore state law compelled the court to reverse Moore's felony-murder conviction. On the other

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[5]Cf. Caldwell v. Mississippi, 472 U.S. _____, 86 L. Ed. 2d 231, 238 (1985) ("we will not assume that a state court decision rests on independent and adequate state grounds when the 'state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law is not clear from the face of the opinion.'" (citation omitted).

[6]The Missouri Court of Appeals conceded that the Missouri Supreme Court had "retroactively appli[ed]" to Moore its expanded interpretation of Missouri's felony-murder statute. Moore III at 581. The court's holding rested solely on its contention that the Missouri Supreme Court's retroactive ruling was neither "unexpected" nor "indefensible" under Bouie. Id.

[7]The Eighth Circuit and respondent have never questioned the Missouri Supreme Court's constitutional right to apply prospectively its new proximate cause theory of Missouri's felony-murder statute.

hand, the Moore III panel held that the Missouri Supreme Court's affirmance of Moore's conviction was not based on an unexpected development of Missouri law and did not, therefore, require that court to reverse the conviction. Petitioner's deference argument is rendered meaningless by the contradictory decisions of the Missouri Court of Appeals in Moore I and Moore III.

III. THE EIGHTH CIRCUIT CORRECTLY INTERPRETED BOUIE WHEN IT HELD THAT THE MISSOURI SUPREME COURT RETROACTIVELY APPLIED AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY MURDER STATUTE TO AFFIRM RESPONDENT'S CONVICTION AND THEREBY DENIED RESPONDENT DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT.

A. The Eighth Circuit Correctly Interpreted And Applied Bouie's Due Process Test Which It Defined In Terms Of "Fair Warning," "Fair Notice," And "Unforeseeability" Of The State Court's Change In Its Criminal Law.

Bouie held that "[w]hen [an] . . . unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." 378 U.S. at 354-55; see also Moore IV, P.A. at A-2 to A-3. The Bouie Court characterized the due process test in terms of "fair warning" ten times throughout its opinion. Subsequent Supreme Court cases have described the test in terms of "fair warning," "fair notice," or "unforseeability." See Marks v. United States, 430 U.S. 188, 192 (1977); Hamling v. United States, 418 U.S. 87, 116 (1974); and Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam).[8]

The Eighth Circuit correctly applied Bouie's due process test to the Missouri Supreme Court's decision in Moore II which

[8]Cf. Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[the] void-for-vagueness doctrine [under the due process clause] requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . .")

affirmed respondent's felony-murder conviction by adopting an expanded interpretation of Missouri's felony-murder statute. The Eighth Circuit concluded that the Missouri Supreme Court in Moore II unforseeably changed the law and retroactively applied the change to affirm respondent's conviction. P.A. at A-3, A-10.

In analyzing the due process issue, the Eighth Circuit observed that the Missouri Supreme Court's decision in Moore II to adopt a "proximate cause" theory of Missouri's felony-murder statute represented a change in Missouri law. To embrace its new interpretation, the Missouri Supreme Court was compelled to overrule its long-standing precedents of State v. Majors, 237 S.W. 486 (Mo. 1922) and State v. Glenn, 429 S.W.2d 225 (Mo. 1968) which had established the "agency" theory of Missouri's felony-murder statute. Under that theory, the Moore I court recognized it was "obliged" to reverse Moore's felony-murder conviction. See Moore II at 753; Moore I at 8-9[*] (Respondent's Appendix at A-13)

The Eighth Circuit concluded that the Moore II court retroactively applied an unforeseeable change in Missouri law. In summarizing the reasons for its conclusion, the court wrote:

> First, both the state court of appeals and the state supreme court recognized that State v. Majors was indistinguishable from the present case. Second, the court of appeals concluded

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[*]The Eighth Circuit's dissenting opinion suggests that the Missouri Supreme Court "did not 'explicitly overrule' Majors . . . ." P.A. at A-13 (Gibson, J., dissenting). The language of the Missouri Supreme Court's opinion contradicts this analysis. Moore II, 580 S.W.2d at 753. Moreover, a subsequent Missouri Court of Appeals decision acknowledges that Moore II "overruled" Majors. State v. Blackmon, 587 S.W.2d 292, 293 (Mo. Ct. App. 1979).

> that Majors represented the existing and controlling law and transferred Moore's case to the state supreme court for the express purpose of re-examining that law. Third, in adopting the proximate cause theory, the state supreme court recognized that no case other than Majors presented the precise question involved and then specifically overruled Majors. In so doing the court significantly expanded the scope of the state's felony-murder statute. Finally, no case arising between Majors and Moore [II] undermined the authority of Majors. P.A. at A-10 to A-11.

In light of Majors and Glenn, petitioner and the dissenting Eighth Circuit judge were compelled to concede the "unsettled" or "ambiguous" nature of Missouri's pre-Moore II case-law. P.A. at A-15 (Gibson J., dissenting); Petition at 14. Respondent could not have had fair notice of prohibited criminal conduct clouded in such judicial confusion.

B. Petitioner, The Missouri Court of Appeals (Moore III) And The Eighth Circuit Dissenting Judge Have Applied An Erroneous Interpretation Of Bouie.

The Missouri Court of Appeals (Moore III) and the Eighth Circuit dissenting judge understood Bouie as establishing a test in which a due process violation occurs only if the retroactive judicial construction of the state criminal statute is "unexpected and indefensible." P.A. at A-15; see also Moore III at 581. The "unexpected and indefensible" language appears only once in Bouie when the court quotes from a textbook on criminal law. 378 U.S. at 354. As reflected by the post-Bouie Supreme Court cases, the Eighth Circuit majority's "unforeseeability-fair warning" test represents the correct interpretation of Bouie and its due process standard. See §III(a) supra.

The Eighth Circuit dissenting opinion and the Moore III court also erroneously suggest that Bouie limited its due process rule when it stated in dicta that "[a]pplication of this rule is particularly compelling where, as here, petitioner's conduct cannot be deemed improper or immoral." 378 U.S. at 362; see P.A. at A-15 (Gibson, J., dissenting); Moore III

651 S.W.2d at 581. Articulating a more accurate description of the role which subjective moral values play in its due process analysis, the Bouie Court wrote:

> [In the] last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in United States v. Wiltberger, 5 Wheat 76, 96, 5 L. Ed. 37-42 [(1820)]. . . . 'It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. . . .'

Bouie, 378 U.S. at 362-63.

One could debate at length the competing moral principles which underlie the "agency" vs. the "proximate cause" theories of the felony-murder doctrine. A state's criminal statutes, as interpreted by a state's courts, ultimately establish the legal moral standards which guide every citizen's life. Thus, the Missouri Supreme Court's adoption of the agency theory of felony-murder in Majors and Glenn represented the state law's "morality" until the Supreme Court adopted the new proximate cause theory in Moore II.

The State of Missouri has punished Moore for his attempted robbery offense. Moore was incarcerated for more than ten years. The Constitution prohibits a state from retroactively applying new sanctions on personal behavior. A state's retroactive application of a new or expanded interpretation of its criminal law represents a form of tyranny which the American constitutional system of justice has refused to countenance.

C. The Language of Missouri's Felony-Murder Statute And The Law Of Other States Did Not Give Respondent Fair Warning Of The Missouri Supreme Court's Reversal Of Its Former Interpretation Of Missouri's Felony-Murder Statute.

The ambiguous language of Missouri's felony-murder statute did not give respondent fair warning that the Missouri Supreme Court would reverse its former interpretation of the statute.

Moore was entitled to rely on the Missouri Supreme Court's opinion in Majors which adopted the agency theory of Missouri's felony-murder statute. The Eighth Circuit correctly observed that "in light of Majors, which narrowed the scope of the felony murder statute, we are not confronted with the statute 'as written' but rather as judicially construed." Moore IV, P.A. at A-8. One may analogize the Missouri Supreme Court's opinion in Majors with the trespass statute in Bouie. The Majors opinion and the Bouie statute both represented the state of the law until the supreme courts of Missouri and South Carolina expanded the judicial interpretation of those statutes.

In Rose v. Locke, 423 U.S. 48, 53 (1975) (per curiam), this Court found that the narrow judicial interpretation of an ambiguous state criminal statute gave the defendant adequate notice that the statute prohibited a specific type of sexual conduct. In the case at bar, one must determine Missouri's criminal law based upon the judicial interpretation of Missouri's felony-murder statute, not the language of the statute itself.

The Missouri Supreme Court's adoption of the proximate cause theory of felony-murder cannot be judged as foreseeable by reference to the law of other jurisdictions. Moore was subject to Missouri's criminal law and Missouri must be bound by its own law. See Bouie, 378 U.S. at 359-60 (meaning of statutes other states is not relevant to a determination of the South Carolina Supreme Court's express pronouncement of its criminal law).

IV. THE EIGHTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH ANY SUPREME COURT OR CIRCUIT COURT OPINION, DOES NOT ESTABLISH ANY NEW PRECEDENT, AND, THEREFORE, DOES NOT MERIT THIS COURT'S REVIEW.

The Eighth Circuit's well-reasoned opinion rests primarily on Bouie and its progeny. No circuit court opinion conflicts

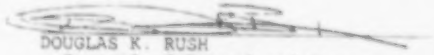
with Moore IV. This Court's repeated affirmations of Bouie reflect that the Eighth Circuit's opinion does not present any novel or important constitutional questions which would merit this Court's review. Indeed, petitioner has not even suggested that this Court reexamine Bouie.

Petitioner attempts to persuade this Court that the Eighth Circuit's opinion violates principles of federalism and impinges on the jurisdiction of the Missouri courts. But the Eighth Circuit opinion merely applied federal constitutional principles and did not decide any questions of state law. Moore IV represents one of many decisions which has applied the Bouie due process retroactivity test on a case-by-case basis. In short, Petitioner has not established a sound basis for this Court to use its limited and valuable judicial resources to review this case. See U.S. Sup. Ct. R. 17.

V. CONCLUSION

This court should deny the petition for writ of certiorari to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,



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APPENDIX A

TEXT OF 28 U.S.C. § 2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

APPENDIX B

Text of State v. Moore, No. 38,783,
slip. op. (Mo. Ct. App. June 27, 1978)

IN THE MISSOURI COURT OF APPEALS

ST. LOUIS DISTRICT

DIVISION THREE

STATE OF MISSOURI,	)	Cause No. 38,783
	)	
Plaintiff-Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	Hon. P.F. Palumbo, Judge
BRIAN KEITH MOORE,	)	
	)	OPINION FILED
Defendant-Appellant.	)	
	)	June 27, 1978.

Defendant was convicted of first degree murder and attempted robbery in the first degree by means of a dangerous and deadly weapon. Defendant's appeal charges that the trial court erred: (1) in failing to discharge him on the ground that his arrest was without warrant or probable cause; (2) in failing to suppress certain evidence and identification testimony allegedly procured by illegal means; (3) in failing to instruct the jury on second degree murder and manslaughter. Our review of the pertinent law leads us to the conclusion that the first degree murder conviction must be reversed. But for the reason hereafter set forth, we transfer the case to the Supreme Court.

Defendant's conviction stems from a robbery attempt in the Emergency Room Lounge in St. Louis. On the evening of July 28, 1975, three young men entered the lounge and announced their intention to commit robbery. The defendant, later identified as one of the robbers, carried a shotgun, and one of his companions, Ross Hogan, displayed a pistol. The plans for an unmolested robbery went awry when a customer, Alfred "Rip"

Williams, drew a .38 caliber pistol from his trousers. Hogan fired at Williams and missed, but Williams, shooting twice, wounded Hogan. A shotgun blast felled Williams, who, while lying on the floor, saw the foot of a man standing over him. Fearing that he would be shot again, Williams fired at the foot, striking it. Retreating from their nefarious incursion, the robbers maintained an enfilade of gun fire, wounding Williams once more.

As the robbers fled the lounge, one was observed to be limping and another holding his side. They were seen discarding the shotgun and pistol from a speeding car as they left the scene of the aborted robbery attempt. The weapons were later recovered by police.

When the violence of the night had subsided, a customer, Lawrence Meadows, was found mortally wounded from a bullet in his brain. Ballistic tests proved that the lethal missile had been fired from the gun of Rip Williams in his ill-considered effort to frustrate the robbery. Two days after the incident, two detectives contacted an informant with whom they had never worked, but about whom they were familiar. The informant told the detectives that he had learned from a relative of the defendant that the perpetrators of the attempted robbery were Ross Hogan, a man named Carl, and the defendant. The police were aware of Hogan's involvement, as he had been arrested and was hospitalized for treatment of shotgun wounds. The informant advised the police that the defendant had been shot in the right foot and was on crutches; that he could be found in either the 4100 block of Ashland Avenue or the 4300 block of Labadie. The same day they received the information, the two detectives saw defendant in the 4100 block of Ashland with a

bandaged right foot and walking with the aid of crutches. When approached, the defendant was nervous, gave the alias of Joseph Madison and stated that he was 17 years old. He possessed no identification. He attributed his injury to stepping on a rusty nail. The police removed his shoe and noticed two wounds, one on each side of his ankle. Defendant was arrested and taken to a hospital for treatment. His shoe, which was confiscated for evidence, was punctured in the places corresponding to his wounds in the ankle.

A physician at the hospital confirmed that defendant's ankle injury was a gun wound. Defendant then gave his correct name and admitted his participation in the robbery but denied any shooting. When police learned from his mother that the defendant was only 16 years old he was immediately taken to the Juvenile Detention Center. Defendant was subsequently placed in a line-up and identified by two witnesses as one of the robbers.

Defendant initially argues that the trial court erred in failing to "discharge" him by reason of the State's failure to establish probable cause for his warrantless arrest. This point is without merit.

"Probable cause" exists where the facts and circumstances within the officers' knowledge and of which thoe have reliable and trustworthy information would warrant a man of reasonable caution to believe that the person being arrested had committed the offense for which he has been placed in custody. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 92 L.Ed. 1879 (1949); Carroll v. United States, 267 U.S. 132, U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (t925); State v. Wiley, 522 S.W.2d 281 (Mo. banc 1975).

Defendant argues that there was no reasonable ground extant for his warrantless arrest, particularly since the arresting officers had not personally known the informant nor had personal experience with him. We disagree with defendant's contentions. As stated in State v. Wiley, supra at 288:

> There is no absolute requirement that the informant be one of previous reliability. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971).
>
> The true inquiry therefore is whether the informant's present information is reliable. As long as the corroboration of the information through other sources, even though the matters are innocuous, reduces the changes of a "reckless or prevaricating tale," the information, even though hearsay, may form the basis of probable cause for an arrest.

Under the circumstances of this case, we have no doubt that probable cause existed for defendant's arrest. The arresting officers had been assigned the specific task of investigating the crime which had occurred two days earlier involving three youths, one of whom had been shot in the foot and had been observed limping from the crime scene. Another of the robbers was already in police custody. The informant had dealt with police previously, albeit not the particular arresting officers, tut they were aware of his past contributions. The informant, attributing his information to a relative of the defendant, advised the police that the defendant had been shot in the right foot, was on crutches and could be found in the 4100 block of Ashland. And exactly as told, the police found defendant, complete with crutches and bandaged right foot, in the 4100 block of Ashland. He gave an implausible explanation for his injury and fit the general description of one of the robbers. The information accurately detailed by the informant was fully corroborated by the personal observation of the arresting officers. The accusation of defendant is thus

readily distinguished from the rumor or vague circumstances decried in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), upon which defendant relies. The arrest was lawful. State v. Grady, 548 S.W.2d 601 (Mo.App. 1977); State v. Kent, 535 S.W.2d 545 (Mo.App. 1976); State v. Wiley, supra.[1]

Defendant's second contention is that certain evidence defendant's shoe with the bullet punctures--and identification testimony should have been suppressed as having been obtained as the result of an illegal arrest. We have already ruled that probable cause existed for defendant's arrest and that it was lawful. Hence, the seizure of the evidence and its use at trial was lawful. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed. 2d 771 (1974); State v. Webb, 560 S.W.2d 318 (Mo.App. 1977); State v. Williams, 554 S.W.2d 524 (Mo.App. 1977); State v. Gordon, 527 S.W.2d 6 (Mo.App. 1975). This is particularly true where the items seized--in this case, defendant's shoe with apparent bullet holes--was in plain view of the arresting officers. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968); State v. Hall, 534 S.W.2d 508 (Mo.App. 1976); State v. Achter, 512 S.W.2d 894 (Mo.App. 1974).

Defendant also asserts State v. Wade, 531 S.W.2d 726 (Mo. banc 1976), as a purported barrier to the use by the State of his shoe and identification testimony linking him to the crime. Wade holds that it is reversible error to

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[1]Of course, an alleged illegal arrest forms no ground for relief on collateral attack once a defendant is convicted, nor does it affect the trial court's jurisdiction to try the case. State v. French, 528 S.W.2d 170 (Mo.App. 1975). So there is no materiality here to the issue of legal arrest.

admit testimony regarding a confession of a juvenile offender made prior to being taken to the juvenile authorities. Wade is not apt here, as the State absolutely refrained from introducing or using defendant's inculpatory statements. The shoe, as discussed, was admissible as being in plain view and having been taken as a result of a lawful arrest.

Defendant cites State v. Ross, 516 S.W.2d 311 (Mo.App. 1974), and argues that the shoe should have been excluded as having been obtained as a result of his inadmissible confession. Ross is readily distinguishable, because the taking of the shoe bore no relationship to defendant's confession which was excluded. The shoe with the bullet holes was suspicious on its face and in plain view, whereas in Ross, police were led to evidence only by reason of the juvenile's confession. Here, we have ruled the shoe admissible, seized pursuant to a lawful arrest. It was not obtained by reason of anything said or illegally gained.

The in-court identification testimony, challenged by defendant, was admissible as it was sustained by ample independent sources. State v. Radford, 559 S.W.2d 751 (Mo.App. 1977).

Defendant's final point is that the trial court erred in failing to give murder second degree and the manslaughter instructions. This precise contention was raised and rejected in the appeal from the conviction of Ross Hogan, defendant's partner in the Emergency Room Lounge robbery, where the court said:

> "His [Ross Hogan's] first contention is that the trial court should have instructed on Count I on second degree murder and manslaughter. In a felony-murder case such instructions are to be given only 'where there is evidence warranting a finding that the murder was not committed in the perpetration or an attempt to commit the felony

> relied upon to authorize a felony murder instruction.' MAI-CR 6.02 caveat a.; State v. Tyler 556 S.W.2d 473 (Mo.App. 1977). The killing of Meadows was solely the product of the attempted robbery and the predictable, although ill-considered, attempt of Williams to thwart it. There is no evidence to support the giving of instructions on lesser offenses of homocide. Defendant was either guilty of felony-murder or he was guilty of nothing." State v. Hogan, ___ S.W.2d ___, No. 38533 (Mo.App.St.L., May 2, 1978).

Defendant contends that the evidence was not clear to establish that he had exhibited the requisite element of deliberation to establish first degree murder. This argument ignores the basic purpose of the felony-murder doctrine: to permit the felonious intent required for a murder conviction to be shown by the perpetration or attempt to perpetrate a felony. State v. Chambers, 524 S.W.2d 826 (Mo. banc 1975). Inquiry into the actual intent of the perpetrator is irrelevant. If a homocide is committed during the actual or attempted perpetration of one of the felonies enumerated in §559.010 RSMo. 1969 (repealed by Laws 1975, p. 408, H.B. No. 150, §2),[2] proof of the commission or attempt to commit that felony authorizes a finding of first degree murder. State v. lindsey, 507 S.W.2d 1 (Mo. banc 1975); State v. Ford, 495 S.W.2d 408 (Mo. banc 1973). Homocide committed in connection with felonies other than those enumerated is murder in the second degree, absent a finding of the elements of the first degree. State v. Jasper, 486 S.W.2d 268 (Mo. banc 1972). Consequently, the allegation that defendant attempted robbery in the first degree, a felony enumerated in § 559.010 RSMo.

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[2]Section 559.010 RSMo. 1969, as repealed by Laws 1975, subsequently evolved into §559.007 RSMo. Supp. 1975, which has been repealed by Laws 1977, P. ___, H.B. No. 90, §2, effective May 26, 1977 as §565.003 RSMo. Supp. 1977.

Defendant was tried under §559.010, as the date of the crime was July 28, 1975.

1969, justifies the submission of the instructions for murder in the first degree. If the jury failed to find the defendant guilty of attempted robbery, he could not be found guilty of murder in any degree. State v. Ford, supra. Thus, defendant was not entitled to have instruction on a lesser degree of murder. Jackson v. State, 558 S.W.2d 816 (Mo.App. 1977).

Defendant asserts that the felony-murder doctrine cannot apply, "in that a bullet from Defendant's gun did not take the victim's life, and in order to be guilty of a homicide, the act of a homicide must be done by the Defendant." Defendant's assertion is inaccurate. Under the felony-murder doctrine, there need be no proof that defendant fired the fatal shot. Participation in a felony--in this case--attempted robbery--is sufficient to support conviction for murder. State v. Ford, supra; Dickson v. State, 449 S.W.2d 576 (Mo. 1970); State v. Francis, 544 S.W.2d 306 (Mo.App. 1976).

But the question in this case is whether defendant can be held liable for a killing by one with whom he is not acting in concert. The only Missouri case dealing directly with this issue is State v. Majors, 237 S.W. 486 (Mo. 1922), which holds that a defendant may not be held guilty for a death in such circumstances. The facts in Majors are remarkably similar to those in the instant case. Majors and two companions participated in the hold up of a gambling house in Kansas City. The robbery attempt was interrupted when one of the gambling house guests, Richard Wade, opened fire on the robbers. A gun battle ensued and one of Wade's bullets went astray, striking and killing another guest, Frank Gardner. Majors was charged with Gardner's murder. In Majors, the

defendant offered the following two instructions which were refused by the trial court:

> (B) The court instructs the jury that if you find and believe from the evidence that the shot that killed Frank Gardner was not fired by the defendant, or by some one with whom he was acting in concert, if any, then you must find the defendant not guilty.
>
> (C) The court instructs the jury that if you find and believe from the evidence in this case that Frank Gardner was killed by a shot fired from a revolver by one Richard Wade, or if you are unable to determine from the evidence beyond a reasonable doubt that said shot was not fired by said Richard Wade, then you must find the defendant not guilty, unless you further find and believe from the evidence beyond a reasonable doubt that the defendant acted in concert with the said Wade to do an unlawful act, and that the death of said Frank Gardner happened and was occasioned by the doing or attempting to do such unlawful act.

In reversing Major's conviction and referring to the first of the goregoing instructions, the Supreme Court stated, l.c. 488:

> "This instruction was the converse of instruction given for the state, and told the jury that if it found and believed from the evidence that the shot that killed the deceased was not fired by the defendant or by some one who was acting in concert with him, then he should be acquitted. This was a correct declaration of law, and such an instruction was warranted upon the evidence adduced by the state." (emphasis added)

The court also held that the second of Majors' offered instructions should have been given as involving the same principle of law. Therefore, under the holding of Majors and under the facts of this case, defendant could not be found guilty of the felony murder of the victim as he was not acting in concert with Rip Williams, who actually fired the fatal shot.

There has been no further pronouncement by the Supreme Court on the precise issue before us since the 1922 Majors case, and we believe that its holding should be reexamined. At the time the victim was killed by Rip Williams' bullet,

defendant was engaged in criminal activity amounting to a felony. Defendant, in perpetrating an attempted robbery, initiated the chain of events which led to the victim's death at the hand of Rip Williams. The death was well within the res gestae of the initial issue, and the causal connection between the death and the robbery attempt would justify holding defendant criminally responsible. State v. Hogan, supra.[3] See State v. Adams, 339 No. 926, 98 S.W.2d 632 (1936); State v. Mullen, 532 S.W.2d 794 (Mo.App. 1975); State v. McClain, 531 S.W.2d 40 (Mo.App. 1975). It would appear reasonable to find that defendant's felonious activity triggered the felony-murder doctrine, and he should tear the forseeable consequences flowing from his unlawful conduct. Reference is made to 56 A.L.R. 3d 239 (1974) for a thorough study and collection of cases dealing with the application of the felony-murder doctrine to a person engaged in a felonious act for a homicide committed by another resisting the act.

Recently, in State v. Phillips, ___ S.W.2d ____, No. 37403 (Mo. St.L., May 23, 1978), this court upheld the application of the felony-murder doctrine to a defendant in the situation where defendant and another person were engaged in a shoot-out between each other with an innocent bystander being killed and with the State being unable to determine which of the participants had fired the fatal shot. In Phillips, the felony-murder doctrine applied because the defendant was engaged in felonious conduct at the time of the killing irrespective of the fact that he might not have shot at the innocent bystander. It would logically follow that the felony-murder doctrine would apply here, for, after all,

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[3]The applicability of the felony-murder rule in the situation where a party not acting in concert with a defendant fires the shot killing an innocent bystander was not raised in State v. Hogan, supra.

defendant was in the process of attempting an armed robbery, and Rip Williams' effort to thwart the robbery--although unwise--was reasonably forseeable.

Therefore, while we would be obliged to reverse defendant's conviction for first degree murder by reason of State v. Majors, supra, we certify this case to the Supreme Court for reconsideration of the felony-murder doctrine as it would apply to a person who perpetrates a felony where another is killed by someone resisting the felony.

Of course, defendant's conviction for an attempted first degree robbery should be affirmed.

/s/ GEORGE F. GUNN, JR.,
PRESIDING JUDGE

/s/ Harry L. C. Weier Judge Concurs

/s/ John J. Kelly Judge Concurs